

BEFORE THE BOARD OF NURSING
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-09-0054-NUR REGARDING:

THE PROPOSED DISCIPLINARY) Case No. 692-2009
TREATMENT OF THE LICENSE OF)
CHRISTY MADDEN, RN,)
License No. 15790.)
)

**PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

I. INTRODUCTION

On October 23, 2007, the Montana Department of Labor and Industry's Business Standards Division (BSD) filed a complaint against the nursing license of Christy Madden, a Montana licensed registered nurse.

On October 3, 2008, the screening panel of the Board of Nursing (BON) found reasonable cause to believe that Madden had violated Mont. Code Ann. § 37-1-316(8) (failure to comply with a term, condition, or limitation of a license by final order of the board), Mont. Code Ann. § 37-1-316(10) (addiction to a habit forming drug), Mont. Code Ann. § 37-1-316(11) (use of habit forming drug which use impairs the user physically or mentally), Mont. Code Ann. § 37-1-316(18) (conduct that does not meet the generally accepted standards of practice) and Admin. R. Mont. 24.159.2301(2)(r) (failing to comply with the contract provisions of the nurse's assistance program). In addition, after making a specific finding that the public health, safety and welfare required the imposition of a summary suspension, the screening panel imposed a summary suspension on Madden's license.

Madden requested a hearing on both the propriety of the summary suspension and to resist the screening panel's proposed action against her license. Hearing Examiner Gregory L. Hanchett held a contested case hearing in this matter on December 5, 2008. Anjeanette Lindle, agency legal counsel, appeared on behalf of the Business Standards Division (BSD). Mark Parker, attorney at law, appeared on behalf of Madden.

BSD's Exhibits 1, 8, 9, 10, 13, and 14 were admitted into evidence. Dustin Johnson, compliance specialist for the Board of Nursing, and Emery Jones, Director of the Nursing Assistance Program, testified under oath on behalf of BSD. Madden presented no witnesses and offered no exhibits. Based on the evidence adduced at the hearing, the following findings of fact, conclusions of law, and recommended order are made.

II. FINDINGS OF FACT

1. At all times pertinent to this matter, Madden has been a Montana licensed registered nurse holding License No. 15790. Madden works as an emergency room nurse at St. Vincent's Hospital in Billings, Montana. The job is highly stressful.

2. In 2005, Madden was convicted in federal district court of an alcohol- related offense consisting of the illegal use of a firearm in a federal park, being under the influence of alcohol in a federal park, and engaging in disorderly conduct. The conviction stemmed from Madden's (who at the time was named Olness) attempting to commit suicide in Bighorn Canyon Recreation area.

3. As a result of these convictions, on February 9, 2006, Madden entered into an informal written assistance program contract with the Montana Nurse's Assistance Program (Exhibit 10). The agreement included specific requirements for an aftercare agreement with the Montana Professional Assistance Program (MPAP) that included specific terms related to Madden's alcohol abuse and dependence. Those terms included the following numbered provisions:

* * *

Regarding Random Urinalysis, I agree:

11. To submit urine for random testing according to the NAP schedule of collections.

I understand that I am to call the toll free number to [the monitoring entity] Monday through Friday, before 11 AM to determine the collection color for that day.

* * *

12. . . . Any unauthorized missed drug screens will be considered a positive result and non-compliance will be issued. Noncompliance with drug screens will result in an increased level of testing and may also result in a report to Montana BON [Board of Nursing].

* * *

Regarding Administrative Requirements, I agree:

15. To return all Quarterly Report Forms to the NAP office by the deadline indicated on the face sheet that is sent out with the set of forms.

* * *

33. I understand that if I am non-compliant with any of the terms of this contract in any respect, the NAP consultant may notify my employer and that the length and terms of this contract may be extended and modified.

34. I understand that if I am non-compliant with the terms of this contract, I may be discharged from the NAP program.

35. I understand that non-compliance with any of the terms of this contract is considered a violation of the Nurse Practice Act as stipulated by the State of Montana.

36. I understand that if I am discharged from the NAP for non-compliance, the Montana Board of Nursing may use any misconduct that may have occurred while enrolled in NAP in disciplinary proceedings, and the Montana Board of Nursing may obtain my complete records of participation in NAP.

4. The terms of the NAP agreement also required that she adhere to the provisions of her NAP contract for a period of three years and that she attend a weekly support group.

5. At her initial intake screening with Jones, Madden exhibited a history of suicidality. She had attended two residential treatment programs for substance abuse. She acknowledged her alcohol dependence and had been diagnosed as suffering from alcohol dependence. At the interview with Jones, she also indicated that she had previously been dependent on Ambien (a benzodiazepine) but that she no longer was taking that drug. She also indicated that she would not be taking that drug in the future.

6. Madden failed to comply with her NAP program on several occasions. Her first instance was her use of Ambien in March 2006 after she had indicated that she would no longer be on that drug. During that incident, she took more than she had been prescribed, a violation of the NAP agreement.

7. Madden's next violations came when she failed to comply with the quarterly self-reporting requirements on three occasions during 2006. She failed to timely file self reports on April 15, July 15, and October 15, 2006.

8. Madden's failure to comply with her NAP contract continued into 2007. She failed to attend her required 12-step meetings in January 2007. She missed two mandatory nurse's support group meetings in 2007. Finally, on October 29, 2007, Madden missed a random drug screening. She explained to Jones that she was assisting a friend who was in crisis. She knew she had to take the screening, but she felt she could not leave her friend. She made no effort to inform NAP of her absence until after NAP contacted her to inform her that NAP had been notified by the monitor that she had failed to attend her random test.

9. Compliance with the random screening is imperative to ensuring that Madden remained substance free. The randomness of screenings ensures that the participant remains honest and cannot cheat the testing system. Compliance with the random testing is not unduly burdensome. If the participant knows she cannot participate during a given time period, then she can simply contact NAP to request that she be excused for a period of time from compliance (for up to a week's duration). In addition, once a participant is told to appear for random

testing, she has until 5:00 or sometimes until 6:00 p.m. that day to do so. A participant is noticed when she calls in (which must be prior to 11:00 a.m.) that she will be required to complete testing that day. This is spelled out in the NAP contract.

10. Because Madden missed the mandatory screening, she was deemed to have tested positive for that random test, a further violation of her NAP agreement.

11. On November 6, 2007, Jones sent Madden a letter telling her that she was not in compliance with her NAP contract. Jones testified (and the hearing examiner so finds) that Madden's attitude throughout her contract tenure "could be characterized as contentious at best." Exhibit 8. Jones also informed Madden that one more noncompliance would result in her case being referred back to the Board of Nursing (BON).

12. After Jones' letter, Madden ingested alcohol in November 2007. She did not notify Jones. Jones subsequently became aware that Madden might have ingested alcohol. Jones confronted her about it and Madden admitted that she had accidentally ingested alcohol by consuming a dessert sauce. She did not, however, advise Jones or NAP of the ingestion. This also violated her NAP contract.

13. On January 5, 2008, Jones notified BON that Madden was not in compliance with her NAP contract. As a result of Jones' complaint, BON requested that Madden start her NAP contract over again.

14. Madden was unwilling to do this. Instead, she quit complying with her contract. She has not participated in her NAP program since June 2008.

15. On August 8, 2008, as a result of Madden's quitting the NAP program, Jones filed a second complaint against Madden informing BON that Madden was no longer in the program. As a result of these two complaints, the screening panel of the BON issued a complaint against Madden as described in the Introduction of this recommended decision. The screening panel also entered a summary suspension, finding that the public health, safety and welfare required immediate action and summary suspension of Madden's license.

16. Madden's failure to adhere to the terms of her NAP contract and her ultimate decision not to comply represents a clear threat to the public. The purpose of ensuring her compliance with the program is to ensure that her alcohol dependence does not affect her ability to safely practice as a nurse. Engaging in the nursing profession obviously requires thinking and physical activity that is unimpaired in any way by the presence of alcohol. Nothing short of requiring Madden to re-enroll in NAP and to start her NAP contract over again can ensure that she can safely practice her profession.

17. If Madden is unwilling to re-enroll in NAP, she cannot be permitted to practice without potentially imperiling the health of patients upon whom she practices. Thus, Madden must be compelled to re-enroll by requiring that her failure to do so will result in her license being suspended until such time as she does re-enroll in the NAP program.

III. CONCLUSIONS OF LAW

A. *The Summary Suspension Was Appropriate.*

1. An agency may order summary suspension of a licensee's license pending proceedings against the license if the agency finds "that public health, safety or welfare imperatively requires emergency action" and the agency makes a finding to that effect in its order of summary suspension. Mont. Code Ann. § 2-4-631(3).

2. The screening panel made a finding that the public health, safety and welfare imperatively required summary suspension of Madden's license. That finding was appropriately incorporated into the notice of action against Madden's license. The panel's determination thus comported with the procedural requirements of Montana Code Annotated § 2-4-631(3).

3. From a substantive standpoint, the decision to impose a summary suspension was well founded. Madden's failure to comport with the requirements of her NAP agreement, in light of her admitted dependence on alcohol, and her subsequent decision to no longer comply with the terms of her agreement presented a threat to the public. It does not take an expert to conclude that a nurse's alcohol dependence left untreated could be a risk of danger to the public. Madden's utter unwillingness to adhere to the requirements of her NAP program created a risk that she could return to alcohol use on the job. Under these circumstances, the screening panel would have been derelict in its duty had it failed to impose the summary suspension. Accordingly, the hearing examiner finds no legal or factual error in imposing the summary suspension in this case.

B. *Madden Has Violated Professional Standards.*

4. The Department bears the burden of proof to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Board of Funeral Service*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126. The Department must also show that any sanction which it seeks is appropriate under the circumstances of the case. In addition, common law and statutory rules of evidence (including Mont. Code Ann. § 26, Chapter 10) apply to this proceeding and control the admission of evidence. Mont. Code Ann. § 37-1-310, Mont. Code Ann. § 2-4-612(2).

5. Mont. Code Ann. § 37-1-316 provides in pertinent part:

The following is unprofessional conduct for a licensee . . . governed by this chapter:

* * *

(8) failure to comply with a term, condition, or limitation of a license by final order of the board.

* * *

(18) conduct that does not meet generally accepted standards of practice.

* * *

6. Admin. R. Mont. 24.159.2301(2)(r) defines unprofessional conduct to include “failing to comply with the contract provisions of the nurse’s assistance program.”

7. The uncontroverted evidence presented in this matter shows that Madden has committed unprofessional conduct under Mont. Code Ann. § 37-1-316(18) and Admin. R. Mont. 24.159.2301(2)(r). Madden failed to comply with the terms of her NAP contract by (1) her use of Ambien which was not in compliance with the contract, (2) her failure to timely file her quarterly reports, (3) her missing a random test, and, of greatest concern to the hearing examiner most importantly, (4) her unilateral decision to cease complying with her contract after June 2008 even though she still had several months left to complete on the contract. Her noncompliance with her NAP contract resulted in her termination from the NAP program. Her license is thus vulnerable to the imposition of the sanctions provided in Mont. Code Ann. § 37-1-312.

8. BSD has also alleged that during the course of her NAP program, Madden continued to use a habit forming drug (alcohol) which impairs the user physically and mentally and that she is addicted to a habit forming drug (alcohol). While there is some suggestion in Jones’ testimony to support these propositions, the evidence overall does not support finding such violations. BSD failed to provide the hearing examiner with competent evidence to prove these two allegations. The actual test results from the random testing that allegedly show the presence of alcohol in Madden’s system were hearsay and, therefore, not admissible. Accordingly, the hearing examiner finds no basis upon which to sustain BSD’s additional allegations that Madden violated her NAP program by testing positive for alcohol.

9. The fact that the proof does not sustain a finding that Madden continued to use alcohol in violation of her NAP program, however, does not lessen the fact that Madden violated her NAP program by failing to comport with other aspects as described above.

C. The Appropriate Sanctions In This Case Include A Term Of License Probation And Suspension Of Madden’s License Until She Re-enrolls In The NAP Program.

10. A regulatory board may impose any sanction provided for by Montana Code Annotated Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Among other things, Montana Code Annotated § 37-1-312 provides that a regulatory board may impose a license suspension.

11. To determine which sanctions are appropriate, the regulatory board must first consider the sanctions necessary to protect the public. Only after this determination has been made can the Board then consider and include in the order requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).

12. BSD has requested that Madden's license be suspended until such time as she agrees to adhere to the revised agreement proposed by NAP. It is abundantly clear from the evidence that the public cannot be protected and Madden cannot be permitted to continue to practice unless Madden agrees to remain in the NAP program under the terms of the revised NAP agreement which includes starting her NAP program over again.

13. Under the circumstances of this case, Madden's license must be suspended until such time as she agrees to re-enroll in the NAP program under terms prescribed by BON. Madden has repeatedly demonstrated her unwillingness to be bound by her NAP agreement. Jones' testimony in that regard is compelling and convinces the hearing examiner that Madden has indeed been recalcitrant and has failed to comply with the terms of her NAP agreement. Madden has no right to practice nursing in the State of Montana free from regulation properly and reasonably calculated to protect the health, safety and welfare of the public. *See, e.g., Wiser v. State*, 2006 MT 20, ¶24, 331 Mont. 28, ¶24, 129 P.3d 133, ¶24. Her ability to practice nursing in Montana is conditioned upon her ability to safely practice her profession upon the citizens of Montana. In light of her admitted alcohol dependence and her unwillingness to follow a program designed to ensure that her alcohol dependence would not adversely affect her ability to safely practice her profession, it is appropriate to require her to accept and adhere to a new NAP contract and its requirements or face a license suspension until such time as she agrees to do so.

IV. RECOMMENDED ORDER

Based upon the foregoing, it is recommended that the Board of Nursing enter its order placing Madden's license on probation for a period of three years from the date of the Board's entry of its final order in this matter with the terms:

(1) That Madden re-enroll in NAP within the time period to be prescribed by the Board and under such terms and conditions as deemed appropriate by the Board;

(2) That Madden shall obey

(a) all provisions of Title 37, Chapters 1 and 8, Montana Code Annotated,

(b) all provisions of Title 24, Chapter 159, and

(c) all requirements or directives imposed by the Board; and

(3) That Madden's nursing license shall be suspended until such time as Madden re-enrolls in NAP under the terms and conditions set by the Board.

DATED this 12th day of December, 2008.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Examiner

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.